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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 LMD INTEGRATED LOGISTIC  
10 SERVICES, INC., a Delaware  
Corporation,

11 Plaintiff,

12 v.

13 MERCER DISTRIBUTION SERVICES,  
14 LLC, a Washington limited liability  
company; and MERCER TRANSPORT,  
15 LLC, a Washington limited liability  
company,

16 Defendants.

CASE NO. C10-1381BHS

ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTION

17 This matter comes before the Court on Defendants Mercer Distribution Services,  
18 LLC, and Mercer Transport, LLC's ("Mercer") motion to strike Plaintiff LMD Integrated  
19 Logistic Services, Inc.'s claim (Dkt. 95). The Court has reviewed the briefs filed in  
20 support of and in opposition to the motion and the remainder of the file and hereby grants  
21 in part and denies in part the motion for the reasons stated herein.  
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23 **I. PROCEDURAL HISTORY**

24 On August 26, 2010, LMD filed a complaint against Mercer for replevin and  
25 money damages. Dkt. 1. On December 17, 2010, LMD filed an Amended  
26 Complaint asserting causes of action of replevin, conversion, tortious interference with  
27 business expectancy, breach of the Washington Consumer Protection Act ("CPA"), and  
28

1 damages in contract. *Id.* ¶¶ 15-34. On January 5, 2011, Mercer answered and asserted an  
2 untitled counterclaim that appears to be a breach of contract claim. Dkt. 30 ¶¶ 39-55. On  
3 January 6, 2011, LMD answered the counterclaim. Dkt. 31.

4 On October 3, 2011, LMD filed proposed findings of fact and conclusions of law.  
5 Dkt. 91. Proposed finding of fact number 21 states that “LMD overpaid Mercer  
6 \$26,206.93 as a result of Mercer’s accounting errors.” *Id.*

7 The parties’ two-day bench trial started on October 4, 2011. *See* Dkt. 93. Mercer  
8 moved to dismiss LMD’s overpayment claim because LMD had not previously pled such  
9 a claim. The Court denied the motion. When LMD began to present evidence of the  
10 parties’ financial dealing, the Court concluded that a Certified Public Accountant  
11 (“CPA”) would be appointed to conduct an audit of the transaction and report back to the  
12 Court.

13  
14 On October 13, 2011, Mercer filed a motion to strike LMD’s overpayment claim  
15 or, in the alternative, allow financial evidence of LMD and Mercer’s relationship dating  
16 to June 9, 2006. Dkt. 95. On October 24, 2011, LMD responded. Dkt. 101. On October  
17 27, 2011, Mercer replied. Dkt. 109.

## 18 **II. DISCUSSION**


19 An amendment that seeks to conform the pleadings to proof introduced at trial is  
20 proper under Rule 15(b) unless it results in prejudice to one of the parties. *Galindo v.*  
21 *Stoody Co.*, 793 F.2d 1502, 1513 (9th Cir. 1986).

22 In this case, Mercer has failed to show prejudice sufficient to preclude LMD’s  
23 claim that it overpaid Mercer. The Court, however, agrees with Mercer that evidence of  
24 all of the parties’ transaction should at least be considered by the appointed CPA.  
25 Objections to the report shall be handled pursuant to Fed. R. Civ. P. 53(f). Therefore, the  
26 Court grants Mercer’s motion to the extent of evidence that the CPA may consider and  
27 include in the report to the Court. The remainder of the motion is denied.  
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1 **III. ORDER**

2 Therefore, it is hereby **ORDERED** that Mercer's motion to strike LMD's claim or,  
3 in the alternative, allow additional evidence is **GRANTED in part** and **DENIED in part**  
4 as stated herein.

5 DATED this 30th day of November, 2011.

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8 BENJAMIN H. SETTLE  
9 United States District Judge  
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